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No. 82-387

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GERALD V. CONROD, JR.,

Petitioner,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In an action brought by a union member for wrongful discharge, has the union fairly represented said member where?

(1) Union officials readily and traitorously conceded that the employer's charges of sabotage were valid despite immediate and repeated claims of innocence by said union members;

(2) Where union officials, though immediately and repeatedly requested to do so, failed to conduct an investigation regarding the validity of the allegations against the discharged employee, wherein there was readily available strong and conclusive evidence and witnesses to prove that the union member did no sabotage nor harm nor caused any loss to the employer,

and did not commit any dischargeable act; and;

(3) Where some decision making Union Officials had critized unjustly the white union member for criticizing some black workers for incompetency, and uncalled for physical threats, and by reason thereof some Union Officers had some hostility against the union member and;

(4) Where Union Officials did not timely notify the union member that they were dropping his grievance so as to enable said member to effectively and timely pursue further appeals to his union or to request continued prosecution of his grievance;

2. Is a prima facie 42 U.S.C. Sec. 1981 "reverse racial discrimination" case presented where international racial discrimination was claimed, but not pleaded, and there was

evidence sufficient to establish that certain black union members were given preferential treatment by black union and Company officials and where certain black employees were either not charged with any wrongdoing nor discharged for doing similar acts, or acts of even greater seriousness than those charged against petitioner.

3. In an action for wrongful discharge, and a claim of wrongful representation by the union defendants, should the District Court in passing upon the motions of the employer and union defendants for summary judgment, consider all evidence, appearing by deposition, and/or by affidavit, answers to interrogatories, and the contentions of law reasonably derived therefrom, as well as all legal contentions referred to in any Motion, Memorandum of Law,

Pre-Trial Brief, or other legal argument or filing, even though at the time the plaintiff has not pleaded the same?

4. Does the Circuit Court of Appeals on an appeal to that Court from adverse judgment in the District Court granting a motion for summary judgment, have the jurisdiction, and the duty, to consider and rule upon a motion to amend the pleadings, to conform to the evidence adduced below in the proceedings below in the motion for summary judgment, and so as to give the party moved against, all the relief to which his actual evidence entitles him, under Rule 54(C) and Rule 15(B)?

5. After a District Court has granted a motion for summary judgment, and the losing party promptly and immediately files a motion for reconsideration, urging by additional

affidavits, sufficient evidence, to demonstrate that, if so considered, that the motion for summary judgment should not be granted, is the trial court under a duty so to consider the said offered additional evidence?

6. Do union and employer defendants in claiming a failure to exhaust intra-union appeals and remedies, bear the burden of proof in establishing that any alleged appeals to the member's union would provide the same, adequate relief as is available in an action in Court, and that such relief is available on grounds no more restrictive, and in a timely fashion within the statutory time limit?

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CERTIFICATE AND PROOF OF SERVICE

Three copies of this Petition For A Writ Of Certiorari was mailed to each of the following counsel for defendants:

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OPINIONS BELOW

None of the decisions below have been reported.

The United States Court of Appeals for the Sixth Circuit rendered an opinion and Order in this case on May 25, 1982, denying Petitioners Petition for Rehearing, reprinted herein as Appendix A, Pg. 1a. The Sixth Circuit Court of Appeals had issued its Order and Opinion, which is reprinted herein as Appendix B, Pg. 6a, on March 4, 1982, affirming the orders and judgment of the District Court for the Northern District of Ohio, Western Division, which on October 15, 1979, had issued its Opinions and Order, which is reprinted herein as Appendix C, Pg. 14a, granting judgment for the defendants on their Motions for summary judgment, which is reprinted herein as Appendix D, Pg. 31a; and likewise the Court of Appeals affirmed the Order of the District Court of October 31,1980,

denying plaintiff's motion under Rule 59 to vacate and other relief, which Order is reprinted herein as Appendix E, Pg.33a.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth District was entered on March 4, 1982. The jurisdiction of this Court is properly invoked under 28 U.S.C. Sec. 1254(1) since the Petitioner is seeking review by the Court of a decision in the United States Court of Appeals for the Sixth Circuit, which on May 25, 1982, issued its order denying this Petitioner's Petition for rehearing.

Petitioner, on August 23, 1982, then within ninety (90) days from May 25, 1982, applied for a ten-day extension to file his Petition for a Writ of Certiorari, and this Court on August 23, 1982, granted an extension to and including September 2,1982, within which to file his Petition for a Writ of Certiorari.

STATUTES INVOLVED

29 U.S.C. Sec. 185 provides:

"Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations

(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of Process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

42 U.S.C. Sec. 1981 provides:

"Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Petitioner Gerald V. Conrod (hereinafter "Conrod") was hired by the Jeep Corporation on August 29, 1974, to work as a spray painter. Conrod then became a member of the International Union, United Automobile, Aerospace, Agricultural, and Implement Workers of America, UAW, Local 12 (hereinafter collectively "Union"). Conrod remained a union member during his discharge and subsequent grievance appeal.

As a spray painter, Conrod worked in a spray paint booth with several other such painters. The painting operation was relatively simple: chassis and frames that ran through the booth along an assembly line were painted by said painters via the use of pressurized spray painting guns.

On October 10, 1975,-after painting a chassis pursuant to his regular course of duties - Conrod, with a free moment and in a playful test of strength, and as his fore-

man and other workers had done without criticism, successfully lifted the newly painted chassis from the assembly line carrier. Such an act was not an uncommon occurrence at the plant; other employees were known to likewise engage in such a test of strength. In fact, there were never any instructions by Jeep that employees should not engage in such activities.

In lowering said chassis, Conrod inadvertently neglected to lower it into its proper groove. Upon noticing that the chassis was out of line, Conrod - of his own volition - acted to remedy the problem. While Conrod was so doing, his foreman, Ken Haggerman (hereafter "Haggerman") observed this and warned Conrod to refrain from such activity in the future.

Subsequent to this reprimand and pursuant to the customary and usual plant procedure and practice, Conrod then proceeded to "bleed" his spray gun. This procedure, in the circumstances then facing Conrod, is performed

by spraying the paint against the wall, because had the gun been "bled" or discharged toward the floor, or "pit", the paint particles might have gotten on the next chassis on the assembly line. Conrod followed this particular practice so as to avoid getting paint on the next chassis.

In the course of this procedure, some of the discharged paint dripped onto the outside of, but not into, a container of paint thinner near the wall. Both the wall and the thinner container were protected by a rubberized, "peel off," and expendible, protectant which was regularly sprayed by Jeep maintenance for such purpose, and periodically removed and replaced. Therefore, because of this protectant, no damage whatsoever resulted to either the wall nor the paint thinner, nor to any other Jeep property.

Thereafter, Haggerman immediately advised Conrod that he was being terminated and accused of sabotage. It should be noted that Conrod neither intended to, nor did Conrod in fact, cause any damage whatsoever as a result of lifting the chassis or from the discharge of the paint. Furthermore, other employees, to the defendants' knowledge, had similarly lifted jeeps and similarly the spray guns against the wall - the same acts as Conrod was accused - but were not fired nor disciplined.

Since Jeep admitted that the only claimed damage to Jeep was from Conrod's acts which allegedly contaminated the container of the paint thinner, the essential factual inquiry is thus posed: Did Conrod on October 10, 1975, do anything which caused any loss, damage, or harm to Jeep's property, or cause any disadvantage or delay to the assembly line? Petitioner

Conrod, from the moment he was fired, immediately denied all such accusations and allegations, asked his Union Steward and Committeeman, and Union and Management representatives, to come to inspect the thinner container, and the assembly line, but both Union and Management failed to check the container and the assembly line, and failed to talk with Conrod's witnesses, his fellow workers. Had they done so, both Union and Jeep representatives would have seen that both Conrod, and his replacement, used the same paint gun, changed satisfactorily to the new colored paint, for the next chassis, and the assembly line continued without delay nor loss, and that nothing had in any way contaminated the container of paint thinner, and Jeep continued to use this same container of paint thinner, in the same condition in which Conrod left it, without any loss or damage, and without it offering any

problem whatsoever. In fact, the Union Steward, and Committeeman, and Conrod's Foreman Hagerman, and Jeep's Paint Room Superintendent, Mr. Roush, a black, all knew that there had been no damage nor loss, but used this as a false front to fire Conrod, whose independence, and conscientious and justified comments of criticism of some of the black fellow workers for incompetency, inefficiency, and uncalled for threats of force, had caused some of the power wielding office holders of his Union to be hostile to Conrod, who in effect had charged his Union and Jeep, as was true, with racial discrimination by Union and Jeep in favor of blacks over whites.

Since the Court's below prejudicially erred in finding Conrod, in effect, chargeable with doing damage to Jeep, this counsel believes it helpful and time-saving

to the Court to here go further in demonstrating the absence in truth of any damage, sabotage or grounds for discharge. First of all, the only damaged claimed by Jeep is given in Jeep's Answer to Plaintiff's Interrogatory 25 as follows:

> "INTERROGATORY NO. 25: What actual damage, if any, did plaintiff allegedly do on or about October 10, 1975, in the incident for which Jeep discharged him? Please state specifically and in detail.
> ANSWER: On October 10, 1975, the plaintiff was observed contaminating a container of thinner by spraying paint into it making it useless. The container of thinner is designed so the head of the spray gun, while not in use, can be immersed in the thinner preventing paint from clogging in the head of the gun."

Since the paint booth during painting operations was continuously filled with paint spray, it's obvious that the thinner container had to be made with some kind of a sealing device which kept out the spray. It was. Likewise, droplets, and drips of paint, and paint spray, during regular painting operations, collected continuously on the top of the thinner container, as

happened here, but this did no damage because it did not get inside. If it had gotten inside, the painters, like Conrod, and his replacement, would have had their different paints mixed in some fashion, but that simply did not occur. Obviously this is a highly crucial and significant demonstrative point, which any employer and union representative, acting in good faith, would have checked, but neither Jeep nor the Union checked the same, although Conrod requested the same, and although Conrod and his fellow workers knew there had been no contamination, and Conrod's witnesses and fellow workers, have, and would so have, sworn and testified, but the Union, though requested, in bad faith refused to check with them.

In short the walls of the paint booth where Conrod worked, and the thinner container and other Jeep property in the paint booth,

were not substantially changed in condition, and were not damaged by any of Conrod's acts or omissions. The painting operations went on without any changes in the paint gun or thinner container. The charge of sabotage was simply not valid, but was actually a false front knowingly used by Jeep and the Union to get rid of a deserving, proud, and independent good worker and union member who "told it like it is," and thus unfortunately - Conrod has been effectively cut off from factory work - deprived of his job and livelihood.

A grievance was filed for Conrod, but the union in an obviously perfunctory fashion, just went through the motions, and did not inform Conrod of the arguments used by Jeep, and the union responses thereto. Also, the union concealed from Conrod the fact that Conrod's grievance was dropped by the union, after the third step. Conrod continuously called to his Union representative,

Defendant Mattoni, who always said the grievance was going along. Defendant Mattoni showed his hostility and bad faith by knowingly and falsely concealing that the grievance was dropped November 5, 1975. In the next spring, Conrod, broke, went to the Toledo Legal Aid Society, and after a lawyer there wrote to Jeep and the union, the lawyer and Conrod first learned in May, 1976 that the union had dropped Conrod's grievance on November 5, 1975. This, in itself, reflected the union's bad faith, "don't care," policy, and prevented Conrod from being able to appeal to his union within thirty (30) days of the adverse union action. When Conrod later tried an appeal to his Local, the Local denied the appeal because it was not filed within thirty (30) days of November 5, 1975.

Union hostility and bad faith was further evidenced when Conrod, went back at

the union headquarters, about a week or so after his discharge, was asked by the top union man, Mr. Davis, a black, if Conrod had told Defendant Committeeman Harris, a black, that Conrod would not have been fired if Conrod had been black, or if fired, that the union would have gotten his job back. Conrod said yes. Mr. Davis, the top union man, didn't even ask Conrod for Conrod's reasons of why Conrod claimed innocence of sabotage. A top union man interested in good faith would have discussed the Pro's and Con's of Conrod's case. Instead, the union, from the day of the discharge, traitorously and disloyally conceded Jeep was entitled to discharge Conrod. Conrod always admitted he had lifted the carrier, and "bled" the paint gun, and always pointed out that the Foreman and others had done the same thing, including "bleeding the paint gun" by other workers, and

that no damage or harm was done, that Jeep had issued no instructions against lifting the carrier nor "bleeding the paint gun" against the wall, and that others had commonly done the same thing but were not fired. Conrod also had pointed out that some blacks had done more serious offenses, but either weren't fired, or the union got their jobs back, but the union simply refused to make these basic and fundamental arguments though requested so to do.

The District Court refused Conrod's Motion to require Answers to Interrogatories asking the union to state the five (5) closest prior cases, or precedents of employees fired or disciplined, both favoring or and opposing Conrod's contentions.

By affidavit, and deposition, Conrod clearly raised different valid defenses to Defendants' Motions for Summary Judgment, including Racial Discrimination under

Section 1981, and other legal grounds, which were not pleaded, but raised by clear reference to the same in the Pre-Trial Brief, which was timely filed on October 12, 1979, although the trial court stated otherwise, and by reference to other filings in the District Court.

After the District Court granted Defendants' Motions for Summary Judgment, plaintiff within fourteen (14) days under Rule 59 filed his Motion to Vacate or Amend the Summary Judgment; and also to require defendants to answer certain Interrogatories, partly directed toward whether the Infra-Union Appeal was in fact illusory, and if it could re-open the grievance procedure, and partly toward requiring the union to state what actual damage Conrod had actually done.

This counsel, having observed at Pre-Trial Conference in other cases,

that the particular District Judge had not imposed any penalties toward attorneys not filing a trial brief, and thinking also that since this case was set for Pre-Trial, that the court would not take any action on the Motions for Summary Judgment, this counsel timely filed his Pre-Trial Brief, which substantially and forcefully argued a Prima Facie case, thinking it would suffice until the Pre-Trial, at which time the court would allow further discovery, any amendments, needed, and take other action toward seeing that the case would be determined on its merits. But instead, the District Court refused to consider the trial brief, and granted summary judgment. Conrod then filed his Motion under Rule 59, within the time limit, and tendered additional relevant and supportive affidavits, one

of which from Wampler, had not been previously available.

Notices of Appeal to the Sixth Circuit were timely filed after each order of the Trial Court, the first Notice on November 14, 1979, and the second Notice on December 1, 1980.

REASONS FOR GRANTING THE WRIT

I. THIS COURT, WHILE ANNOUNCING THE DUTY OF THE UNION TO ACT IN GOOD FAITH, IN A NON-PERFUNCTORY MANNER, FREE FROM HOSTILITY OR FRAUD, HAS NOT DEVELOPED THE MINIMUM REQUIREMENTS OF FAIR REPRESENTATION AS TO THE BASIC DUTIES OF INVESTIGATION AND FOLLOWING UP LEADS. THE FEDERAL AND STATE COURTS NEED THE DIRECTION WHICH A DECISION ON THIS CASE WILL AFFORD.

This counsel states that from his research, which now includes many hours, he has not found one decision from this Court dealing with the union's duties to investigate. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, dealt with a case where the union had failed to check out the requests of the discharged truck drivers for the union to see certain witnesses. But the issue of whether the union was guilty of unfair representation was not before the Court.

In the instant case, Conrod, while admitting he lifted the carrier, and "bled" his paint gun against the wall, repeatedly claimed his innocence of sabotage, and damage to property, and asked both union and

company to investigate the alleged damaged Jeep property and to inspect it, and to talk to his replacement and fellow worker witnesses, because even after Conrod had "bled" his paint gun, both Conrod and his replacement painted several jeeps without any problems. But the Union and Jeep refused.

The instant Conrod case also presents an opportunity for judicial declaration of what constitues union hostility, reverse racial discrimination, and disparate treatment, as Jeep had never fired anyone for mere damage to property, as was demonstrated by Jeep's Answers to Interrogatories.

The duties of the union in investigating the relevant facts and arguments has been discussed in various federal cases; Thompson v. International Association of

Machinists, 285 F.Supp. 235 (U.S.D.C., E.D.Va. 1966, at page 238; Bazarte v. United Transportation Union, 305 F. Supp. 443, 444 (U.S.D.C., Penn. E.D. 1969); See Ruzicka v. General Motors Corp., 523 F.2d 306 (CA6, 1975), which some commentators say establishes negligence as unfair representation; Baldini v. Local U. No. 1095, International Union, 581 F.2d 145, 151 (CA 7, 1978).

Both the discharged employee and the union will benefit from the direction this case can afford. The duty fairly to investigate is crucial to the American tradition.

II. PETITIONER'S EVIDENCE ESTABLISHED A PRIMA FACIE CASE OF REVERSE RACIAL DISCRIMINATION. THE FEDERAL COURTS, AND INDEED THE STATE COURTS ALSO, NEED DIRECTION FROM THIS COURT AS TO THE BASIC REQUIREMENTS FOR AN EMPLOYEE DISCHARGE CASE AS TO WHAT CONSTITUTES REVERSE RACIAL DISCRIMINATION, AND THE DUTY OF THE TRIAL COURT TO CONSIDER THE SAME, EVEN THOUGH NOT PLEADED, OR IN THE ALTERNATIVE, TO GRANT LEAVE TO FILE AN AMENDED PLEADING.

The evidence illustrates that both the union and Jeep rendered preferential treatment toward blacks in general and racially discriminated against Conrod in particular. There were instances where blacks committed more serious offenses than those with which Conrod was charged but were not disciplined in any way.

The most notable instance occurred where Conrod witnessed a black coworker maliciously and purposely banging a jeep with a hammer - in the presence of his foreman - and this individual was not reprimanded. In addition, Conrod had critized a black with whom he was working who was not adequately performing his

job. When Conrod complained that this individual was hindering assembly line operations, both Jeep management and the union officials sided with the black employee and were openly hostile toward Conrod. Racial discrimination, in the last two lines of the quote from Conrod's affidavit - filed before Summary Judgment.

The intricacies of labor law, racial disrimination, and what does evidence the same, are no more today known to the lawyers available to the discharged employee, than were known by this counsel then.

Yes, our great Country, and its great Bench and Bar, do need the help from this great Court in furthering our best judicial traditions, in this area of the law.

In the instant case, the Sixth Circuit at first thought that an employee could not

assert reverse racial discrimination under Title 42, Section 1981, and dismissed that part of the claim because no Title 42, "Section 7" charge had been filed before the Equal Employment Opportunity Commission. Only on Petition for Rehearing did it consider McDonald v. Santa Fe Transportation Company, 427 U.S. 273, (1976) but then the Sixth Circuit refused to apply it.

This counsel had given Jeep and the union notice of the claim at Conrod's deposition. Conrod himself, not a lawyer, in fact knew it, but didn't realize the legal implications. His deposition, at its page 87, reads in part:

> "Q. You're not contending in this case that you were discharged for any racial reasons, are you?
> A. Not just for that, no. No, not - - no, not for - - no.
>
> MR. RUST: I can say for the record, we're going to contend everything, so that you can be informed and depose him."

This counsel timely filed his Pre-Trial Brief on October 12, 1979, a date specified

as proper in the Pre-Trial Notice from the District Court. At page 19 of Plaintiff Conrod's said Pre-Trial Brief, filed before the District Court granted Summary Judgment, the Brief at page 19 thereof reads in part as follows:

> "There are many, many contraverted issues of significant fact, and the same allow the inference of improper motive, bias or malice.
>
> Likewise, as Plaintiff stated in his heretofore filed Affidavit in Paragraph 11, which reads:
>
> '11. I claim that the Union and its representatives were company dominated, and that they worked in cohorts with the foreman and management against me, and denied me my rights; and that when the details are unfolded, through the Interrogatories and other investigative procedures, that this will become evident to the Court and Jury. I believe that if I had been black that Jeep would not have sought to fire me and the Union would have kept my job for me. This is based upon prior observations.'"
>
> This shows a claim of reverse discrimination.

III. THE FEDERAL AND STATE COURTS NEED DIRECTION FROM THIS COURT THAT A PARTY OFFERING

EVIDENCE BY AFFIDAVIT, DEPOSITION, OR OTHERWISE, SHOULD BE ENTITLED TO HAVE HIS PLEADING DEEMED AMENDED TO ACCOMODATE ALL LEGAL CLAIMS AND DEFENSES RAISED BY THE EVIDENCE ADDUCED SO AS TO EFFECTIVELY OPPOSE A MOTION FOR SUMMARY JUDGMENT, AND THE COURT, IF NEED BE, SHOULD GRANT LEAVE SO TO AMEND, BEFORE RULING ON THE MOTION.

Rule 15(b) of the Federal Rules of Civil Procedure provides, in part: "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

In the case at bar, evidence was raised that suggested that, if considered by the Court, there were factual issues in dispute so as to successfully oppose the defendant's respective Motions for summary judgment.

In Johnson v. Mateer, 625 f.2d 240 (CA 9, 1980), after the defendant moved for summary judgment, the plaintiff responded with additional affidavits with new allegations made therein. The Ninth Circuit held that, even though no request was made in

any court to amend, the plaintiff's complaint nevertheless was deemed to be amended. Id at 242.

Another case wherein a theory of legal liability was successfully advanced for the first time in a memorandum filed in opposition to a motion for summary judgment is Sherman v. Hallauer 455 F 2d 1236 (CA5, 1972). See, also, Freeman v. Marine Midland Bank-New York 494 F 2d 1334(CA 2, 1973).

The history of the actions of the attorneys here is common, and many citizens will lose deserved claims and defenses, unless the Rules are so interpreted and applied. For the Courts to do justice is to enhance our great traditions.

IV. ON AN APPEAL TO THE CIRCUIT COURT OF APPEALS, FROM AN ADVERSE JUDGMENT IN THE DISTRICT COURT GRANTING A MOTION FOR SUMMARY JUDGMENT, THE COURT OF APPEALS HAS BOTH THE RIGHT AND DUTY TO CONSIDER AND RULE UPON A MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE ADDUCED BELOW.

Since the Federal Rules of Civil Procedure are directed to the District Courts, there is then no express rule decisive in the Court of Appeals dealing with the issue. However, under the general powers invested in the Court of Appeals, that court has the power, jurisdiction, and the duty to hear, consider, and ultimately grant said Motion.

According to 3 Moore's Federal Practice at page 15-168, "an amendment to conform to the evidence may be made at anytime or Motion by any party, even in the Appellate Court..." (Emphasis added). 3 Moore's Federal Practice ¶ 15.13(2), (1974).

In Dunn v. Transworld Airlines, Inc., 589 F 2d 408 (CA 9, 1978), the Ninth Circuit

noted that "[u]nder Rule 15(b)...an amendment may be made at any time on the motion of any party, even at the appellate level." Id at 412.

In Lamb v. Sutton 274 F 2d 705 (CA 6, 1966), the defendants in the slander action claimed that they were immune from prosecution under the Federal Communications Act of 1934. However, said defendants failed to specifically plead or name the applicable statue. The Sixth Circuit, pursuant to Federal Rule of Civil Procedure 15(b), treated the defense as if it were properly raised. See also, Hasselbrink v. Speelman 246 F.2d 34 (CA6 1957), Underwriter's Salvage Co. of N.Y. v. Davis and Shaw Furniture Co. 198 F.2d 450 (CA 10 1952); Katz Drug Co. v. Katz 89 F. Supp. 528; and Purofied Down Products Corp. v. Corp. v. Travelers Fire Ins., Co. 278 F2d 439 (CA 2, 1960).

Therefore, based upon the foregoing, the Sixth Circuit Court of Appeals should have considered the subsequent evidence proffered by Conrod, as a matter of right pursuant to Federal Rule of Civil Procedure 15(b).

V. THIS COURT SHOULD DECLARE THE NEEDED PRINCIPLE THAT THE EMPLOYER AND UNION EACH HAD THE BURDEN OF PROOF IN ESTABLISHING THE AFFIRMATIVE DEFENSE OF THE EMPLOYEE'S ALLEGED FAILURE TO EXHAUST HIS INTRA-UNION REMEDIES, BY SHOWING THE UNION APPEAL GAVE RELIEF AS BROAD AS A SECTION 301 ACTION, IN A TIMELY FASHION.

In Clayton v. International Union, etc., 451 U.S. 679 (1981), the Supreme Court held that since petitioner Clayton could not have obtained adequate relief through intra-union appeals, then the requirement of the exhaustion of such internal union appeals as required by Hines v. Anchor Motor Freight, Inc., 424 U.S.554(1979) was not a bar to Clayton bringing suit under Section 301 of the Fair Labor Management Act 29 U.S.C. Sec. 185.

In rendering its decision, the court did not address the issue of which party bears

the burden of proof regarding the failure to exhaust intra-union remedies because the record was adequate and, therefore, the issue was not raised.

In the case at bar, the union should bear the ultimate burden of proof because, in addition to being the moving party, the union has better access to information and has a closer relationship to the international union than does the petitioner. In addition, the union defendants and Jeep should bear the risk of persuasion because they are the moving parties who raised the issue. See, generally, Volume 6, Moore's Federal Practice, p. 56-466.

In Johnson v. General Motors Corp., International Union, U.A.W., etc. 641 F.2d 1075 (CA 2, 1981) the court placed the burden of proof on the union. In rendering its decision, the Second Circuit noted that the

union is in a better position than the employee to address the court regarding the adequacy of the Intra-union remedies available. Id at 1079. See, also, Orphan v. Furnco Construction Corp. 466 F.2d 795, 861-02 (CA 7, 1972); Dorn v. Meyers Parkway System 395 F. Supp. 779, 785-86 (E.D. Pa 1975); and Cammarata v. Ice Cream Drivers and Employees Union, etc., 441 F.Supp. 696 (E.D.N.Y.1977), aff'd mem. 591 F 2d 1329 (CA 2, 1978).

Because the Supreme Court has not directly addressed the issue, of burden of proof, regarding the exhaustion of intra-union appeals, the court should review this case in order to implement the decision of Clayton, Supra.

VI. THIS COURT SHOULD DECLARE THE DUTY ON ANY TRIAL OR REVIEWING COURT TO CONSIDER ANY AND ALL EVIDENTIARY FILINGS, INCLUDING AFFIDAVITS, WHICH ARE FILED WITHIN THE TIME LIMIT FOR A MOTION UNDER RULE 59, IN PASSING ON A MOTION FOR SUMMARY JUDGMENT.

In this case, Conrod attached to his Rule 59 Motion, timely filed after the court had granted summary judgment, three affidavits, one from fellow worker and witness Wampler, which added some new evidentiary points, and corroborated the disparate treatment which Conrod was given. Also, the motion stated on page 2 thereof:

> "3. Blacks had committed more serious wrongs, even involving damage to Jeep's property, with knowledge of Jeep and the Union, but were not fired;"

and at page 3:

> "4. Union Leaders Booker Harris, George Davis, and others concentrated their interest in discussing Plaintiff's

remark to Booker Harris that if Plaintiff had been black, Jeep would never have fired Plaintiff, and at any rate, the Union would have saved his job, and would have prevented him from being subjected to all that harassment;

5. The Union was sore and biased against Plaintiff, partly because previously he had complained about black workers who weren't doing their jobs, and the Union had threatened Plaintiff with charges of harassing black workers if he had persisted;"

Also, Plaintiff's Rule 59 Motion asked for the Court to order Jeep and the Union Defendants to answer relevant interrogatories as to the scope of relief available through intra-union appeals, the length of time involved, and whether the grievance could

thereby be re-opened.

That relevant additional evidentiary filings, such as affidavits, depositions, should be considered by the District Court in determining a motion for Summary Judgment, though filed with a Rule 59 Motion after an original adverse Summary Judgment, was held in Chapman and Dewey Lumber Co., v. United States, 359 F.2d 495, (CA 6, 1966) where the opinion at page 498 reads as follows:

"After the motion for judgment was allowed, counsel for the appellant moved for a new trial and supported the motion with four affidavits. These affidavits do present issues of material facts.

We believe under the circumstances of this case, counsel having been induced to waive his argument on the motion for judgment, and in fairness to the taxpayer, there should be a plenary hearing on the issues raised by the affidavits.

Accordingly the judgment is vacated and the case is remanded to the District Court with instructions to conduct a trial solely on the issue of whether any of the items which make up the claim for refund are properly chargeable to deductible expense."

CONCLUSION

When an employee has been discharged, he or she usually is without funds to pay an attorney on an hourly basis. The factory discharge for alleged cause is for the employee the equivalent of "Capital Punishment" - a real bar to future employment. Hard working, able, and concerned counsel, in the past, and today, simply are not, and in the future will not, be available to meet and timely master all deadlines and the intricacies of law and factual patterns involved in getting justice for the discharged employee.

This counsel, relatively inexperienced in this field at the start and early stages of this case, has worked hard, and yes, in a scholarly fashion, assembled for the Court of Appeals, and to a lesser extent, for the District Court, highly relevant precedents. Misunderstanding of the facts and law, has beset Mr. Conrod and his counsel.

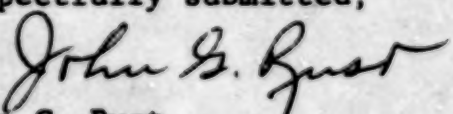
Our cause is just.

The relief herein prayed for is needed - yes, by Mr. Conrod and his counsel, and also importantly, by other discharged employees, and their counsel, and by the Bench and Bar.

Mr. Conrod and his counsel proudly and respectfully pray that our Petition be granted.

WHEREFORE, petitioner requests that this Court issue its Writ of Certiorari to the United States Court of Appeals, Sixth Circuit, and review the questions contained in the Questions Presented For Review, appearing at page (i) herein.

Respectfully submitted,



John G. Rust
833 Security Building
Toledo, Ohio 43604
Phone: (419) 243-9191

Attorney for Petitioner

Dated: September 2, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-3774

GERALD V. CONROD, JR.,

Plaintiff-Appellant,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Defendants-Appellees.

O R D E R
DENYING PETITION
FOR REHEARING

FILED: May 25, 1982

Before: BROWN and KENNEDY, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

The Court has not favored rehearing en banc in this case so the petition for rehearing has been referred to the hearing panel for our consideration.

The Court's order of March 4, 1982,

disposed of appellant's claim that he was the victim of reverse racial discrimination on the ground that because the only authority appellant cited in support of his claims was McDonald v. Santa Fe Transportation Co., 427 U. S. 273 (1976) and McDonald was a Title VII case, the claim should be construed as arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Because appellant had not first filed a charge with the Equal Opportunity Employment Commission (EEOC) we ruled that his Title VII discrimination claim could not be raised in the federal court. Appellant's petition for rehearing brings to the Court's attention that McDonald was a suit not only under Title VII, but also under the Civil Rights Act of 1866, 42 U.S.C. § 1981. Therefore, we consider

appellant's contention that he should be permitted to proceed on a claim that he was the victim of reverse discrimination under section 1981.

Filing a charge with the EEOC is not a prerequisite to suit under section 1981. However, appellant is still entitled to no relief on appeal. He did not fairly raise this cause of action prior to entry of judgment by the District Court. His complaint does not mention racial discrimination, and in context the sporadic references to race in appellant's other pre-judgment pleadings are insufficient to put the parties or District Court on notice that racial discrimination was a ground on which appellant claimed relief. In fact, in his deposition appellant states that he is <u>not</u> claiming that he was dis-

criminated against.

Further, even if the discrimination issue was raised, appellant offered only the most conclusory statements in support thereof prior to judgment. Such conclusory allegations are not sufficient to withstand appellees' motions for summary judgment under Fed. R. Civ. P. 56. Bryant v. Commonwealth of Kentucky, 490 F.2d 1273, 1275 (6th Cir. 1974).

Finally, there is no such evidence of racial discrimination in appellant's post-judgment Rule 59 motion for us to find that the District Court's refusal to vacate or amend its judgment was error, much less an abuse of discretion. See Huff v. Metropolitan Life Ins. Co., No. 81-3030, slip op. at 4 (6th Cir., Apr. 13, 1982). Accordingly, construing appellant's discrimination claim as arising under Sec. 1981, we still are not persuaded to re-

verse the District Court's entry of summary judgment in favor of appellees.

All of the other issues raised in appellant's petition for rehearing were adequately considered and disposed of in the order of March 4. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-3774

GERALD V. CONROD, JR.,

Plaintiff-Appellant,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Defendants-Appellees.

O R D E R

FILED: March 4, 1982

Before: BROWN and KENNEDY, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

Apellant Gerald V. Conrod, Jr., brought this suit pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, alleging that appellee Jeep Corp. wrongfully terminated him in violation of the collective bargaining

agreement between Jeep and Local 12 of the United Automobile, Aerospace, and Agricultural Implement Workers of America. The complaint further alleged that Local 12 breached its duty of fair representation by not taking his grievance on his discharge to arbitration. The District Court granted appellees' motions for summary judgment.

Appellant was hired by Jeep as a spray painter in 1974. During the next several months he was disciplined five times for absenteeism. On October 10, 1975, appellant was working in a spray booth through which the assembly line ran. "Playfully" testing his strength, he lifted a chassis off the assembly line and failed to replace it properly. For this he was reprimanded by his foreman, Mr. Haggerman. Appellant argued with the foreman, then sprayed his paint gun toward the wall for a five to eight second period. In the process, appellant

sprayed a paint thinner container that had to be kept free of paint to clean properly the nozzles of spray guns. The foreman fired appellant for sabotaging company property.

Appellant complained to his union steward, who met with Haggerman and other company officials in an unsuccessful attempt to have appellant reinstated. The union steward advised appellant to file a grievance and assisted him in preparing it. The grievance was taken through the second and third steps by Local 12, but the foreman concluded that he had already given appellant too many chances and refused to reinstate him.

Appellant retained private counsel, who eventually learned that Local 12 had decided not to take appellant's grievance to arbitration and that appellant had exhausted his intra-union remedies at the local level.

Counsel also learned that further appeal to the International was available. Appellant did not pursue this remedy, choosing instead to file this action.

The District Court ruled that exhaustion of intra-union remedies is a prerequisite to suit under section 301 for breach of the duty of fair representation, unless exhaustion would be futile. Although appellant made a weak allegation of futility, he also filed an affidavit saying he did not try to exhaust because he thought it would take too long, and because his attorney advised him that he had no right of appeal. The court found this imsufficient to warrant an exception to the exhaustion requirement and granted Local 12's motion for summary judgment. As to appellee Jeep, the court found no question but that there was just cause to fire appellant, so granted Jeep's motion for

summary judgment on the charge that it violated the collective bargaining agreement.

After the motions for summary judgment were granted appellant presented the District Court with a further affidavit and moved under Fed. R. Civ. P. 59 to have the summary judgment set aside. The court ruled that the new evidence was merely an embellishment of the old, and denied the motion.

On appeal appellant claims: (1) He was denied fair representation because Local 12 did not inquire whether any damage was actually done to Jeep, and he was not guilty of sabotage unless he had an intent to do actual damage; (2) Both Local 12 and Jeep were motivated by reverse racial discrimination in their handling of his case; (3) Appellant's interrogatories to Local 12 going to the futility of intra-union remedies should have been answered

before Local 12's motion for summary judgment was granted; (4) Appellant was denied fair representation when Local 12 concealed from him the fact that it had dropped his grievance until after the time to appeal to it and the International had expired; (5) The summary judgment should have been set aside because promptly after it was granted appellant presented the District Court with evidence sufficient to state a claim for relief.

To prevail under section 301 against either the UAW or Jeep, appellant must establish both that the UAW breached its duty of fair representation and that Jeep violated the collective bargaining agreement. Clayton v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers, 49 U.S.L.W. 4550, 4552 n.4 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-571

(1976). In this case the District Court found that appellant was fired for just cause. The only issue appellant raises that arguably challenges this finding is the last -- that the postjudgment affidavit submitted to the court stated a claim for relief. The only evidence helpful to appellant in the affidavit is a claim that several other employees were not fired for doing similar acts. This evidence, which if true still does not establish that appellant was not fired for just cause, does not warrant reversing the District Court's grant of summary judgment. Appellant offers no evidence to support his allegation that intent to do damage is a prerequisite to firing for sabotage.

We treat appellant's claim of racial discrimination as an allegation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq., since the

only authority appellant cites in support of his claim is McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976), a case brought under Title VII. It is clear that a condition precedent to filing a lawsuit under Title VII is the filing of a charge with the Equal Employment opportunity Commission and the receipt of a right to sue letter. Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1092 (6th Cir. 1974). Appellant has done neither.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman,
John P. Hehman, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 77-562

Gerald V. Conrod, Jr.,

Plaintiff,

vs.

Jeep Corporation, et al.,

Defendants.

OPINION AND ORDER

FILED: Oct. 15, 1979

Before: YOUNG, J.

The complaint, brought pursuant to Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, alleges that defendant Jeep Corporation (Jeep) breached the collective bargaining agreement with defendant United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12 (hereafter Local 12) by wrongfully terminating the employment of plaintiff. The complaint further alleges that

defendants Local 12, Dominic J. Mattoni and Booker Harris did not fulfill their responsibility to represent plaintiff fairly in that they failed to take his grievance on his discharge to arbitration.

Defendants Local 12 and Jeep have moved for summary judgment. In response to the motions, plaintiff moved for oral hearing, for reasonable time for discovery, and for other relief. Plaintiff thereupon served interrogatories upon defendants. Defendants filed opposition to plaintiff's motion for oral hearing, for leave for discovery time and for other relief, whereupon plaintiff filed an affidavit couched in terms of an opposition to the motions for summary judgment. Defendant Jeep responded to the interrogatories, but defendant Local 12 did not. Plaintiff moved for an order compelling Local 12 to answer interrogatories.

The Court considered all of the above

motions, and on July 12, 1979, entered an order overruling in part and sustaining in part plaintiff's motion for oral hearing, for leave for reasonable time for discovery and for other relief. The Court denied plaintiff an oral hearing but granted time for reasonable discovery in that plaintiff apparently was seeking answers to the interrogatories which had been filed. Plaintiff was granted leave for discovery to the extent that it involved obtaining answers of Local 12 to interrogatories, with the Court holding in abeyance the motions for summary judgment. The Court, sua sponte granted plaintiff leave to file an additional opposition to defendants' summary judgment motions within 20 days following the filing of Local 12's answers to interrogatories. Local 12 filed its answers in this Court on August 20, 1979, and to-date plaintiff has not filed addition

opposition to the summary judgment motions. That being so, the Court will consider the summary judgment motions at this time.

It is not disputed that plaintiff was employed as a finish paint sprayer by Jeep from August 29, 1974, until the time of his discharge on October 10,1975. While plaintiff was so employed, he was a member of Local 12. During plaintiff's employment, at least one written warning and four disciplinary layoffs were instituted against him as a result of his chronic absenteeism. (Pltf.Dep.28, 32, 36, 39, 44; Local 12 s.j.mo. Ex. g, d, e, f). The incident which precipitated plaintiff's discharge, however, occurred on October 10, 1975, when his supervisor, Ken Haggerman observed him lifting a chassis from the assembly line carrier in a moment of playfulness and as a test of his strength.

(Pltf.Dep.64, 65; Comp.¶3). Plaintiff was reprimanded by his supervisor, whereupon he turned his attention to bleeding his spray gun to get ready for his next job. (Pltf.Dep.65, 75; Comp.¶3). While discharging the paint from his spray gun, paint was sprayed onto the nearly walls and onto a container of paint thinner which was used for cleaning the guns. (Pltf.Dep.76,78; Comp.¶3). Shortly thereafter, Mr. Haggerman told plaintiff he was fired. (Pltf.Dep.81). The matters are undisputed, nor can it be argued that they do not constitute just cause for discharge of an employee under the company's rules and the collective bargaining agreement. Upon being informed of his termination, plaintiff filed a grievance protesting his discharge. (Pltf.Dep.89; Local 12 s.j.mo.Ex.h). Local 12 took plaintiff's grievance through the third step of the

grievance procedure. However, they did not pursue his grievance through the entire grievance framework and to arbitration. (Aff.Mattoni,Harris,Davis).

In the motion for summary judgment filed by Local 12, it is claimed that summary judgment should be granted in its favor for the following reasons:

(1) That plaintiff's complaint and deposition contain only conclusory allegations which are insufficient to state a claim for breach of duty of fair representation;

(2) That the union did not breach its duty of fair representation by failing to take plaintiff's grievance to arbitration; and

(3) That plaintiff's claim is barred because he failed to exhaust his internal union remedies.

It cannot be disputed that as a general

rule, a prerequisite to suit under 29 U.S.C. Sec. 185 for breach of duty of fair representation is the exhaustion of intra-union remedies. Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir.1975); Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir.1968). Article 33, Sec. 12 of the Constitution of the UAW International Union provides:

> It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision, or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress.

There is no doubt that plaintiff has failed to exhaust his intra-union remedies.

As with most rules, there are exceptions to the rule requiring exhaustion of intra-union remedies. For instance, one is not limited to the exclusive remedial procedures established by the collective

bargaining agreement when the conduct of his employer amounts to repudiation of those contractual procedures. Vaca v. Sipes, 386 U.S.171(1967). Additionally, one may bring suit when the union has the sole power under the contract to invoke the higher stages of the grievance procedure, and the member is prevented from exhausting his contractual remedies by the union's wrongful refusal to process a grievance. Id. Finally, one will not be required to exhaust his intra-union remedies where the effort to so proceed would be wholly futile. Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324(1968). In this case, the Court does not find that any of the above stated exceptions apply. There was no attempt on the part of defendants to repudiate contractual procedures, the appeal procedure available to plaintiff was not totally within the control of the union, and there is no allegation that the

exhaustion of intra-union remedies would have been futile.

Plaintiff's complaint claimed that he sought intra-union appeals but that such appeals were "buried," or would have taken more than six months for action, contrary to 29 U.S.C. Sec. 411. Plaintiff's deposition and affidavit filed in opposition to the summary judgment motions, however, claim that no appeals were filed, the reason being that plaintiff thought the process would take too long and that his lawyer had told him he had no right to take an appeal.

Focusing on the specifics of what transpired after plaintiff filed his grievance with Local 12, the Court notes that plaintiff apparently became dissatisfied with how the union officials were handling his grievance and retained a lawyer through Legal Aid to act on his behalf. (Pltf. Dep. 100-01). Plaintiff claimed that when Local 12 decided

not to take his grievance further, he was not notified by the union personally, but by his legal aid counsel (Pltf. Dep.101). Plaintiff claims that he did not learn from his attorney that Local 12 had ceased action on his grievance until after his 30-day appeal time to Local 12 had expired. (Pltf.Aff. ¶8). The Court is reluctant to criticize Local 12 for not serving notice of the termination of plaintiff's grievance on him personally, since he had engaged a lawyer to represent him and his lawyer was so notified. While there appears to be a question as to whether plaintiff's lawyer received notice within a 30-day period or simply failed to transfer the information to plaintiff within that time (Pltf.Aff. ¶8;Pltf.mo. to compel discovery,p.2), such a fact is not material to the Court's consideration herein, for when plaintiff became aware of the status of his grievance,

even if it was beyond the 30-day time for local appeal, he had an appeal to the International Union which he did not pursue. Plaintiff raises no allegations that Local 12 tried to block his appeal to the International Union. Rather, the record indicates that it was plaintiff's legal aid attorney who felt it was unnecessary to proceed via the union channels when plaintiff's grievance was denied. (Pltf.Dep. Ex.k).

The record indicates that subsequent to plaintiff's dealings with his attorney from legal aid, he retained other counsel who contacted Local 12 regarding a local appeal, was informed that the time limitations had expired for such an appeal, and that any further appeal was to be made to the UAW International Union. (Pltf.Dep. 108; Ex. k,l,m,n; Jeep s.j.mo.Ex.n). Plaintiff's attorney contacted the Public Review Board of the International Union for information

regarding an apparent appeal, and such information was provided. However, the evidence is undisputed that plaintiff never instituted any type of appeal proceeding with the International Union. (Howard letter of 10/5/76; Klein letter of 10/12/76; aff.Klein,Beckham).

When looking at the circumstances of plaintiff's grievance from the vantage point of intra-union exhaustion requirements, it is clear that we are not dealing with a situation such as that which existed in Ruzicka v. General Motors Corp., supra, wherein a union, with no decision on the merits of a grievance, allowed a grievance deadline to pass without giving notice of that fact to either the employee or the employer. In this case, while there is some question as to the notice which plaintiff received, it is clear that there was a decision on the merits of plaintiff's

grievance before Local 12 decided not to pursue plaintiff's grievance further. (Aff. Davis,Harris and Mattoni). Furthermore, in the Ruzicka case, the claimant therein had sought intra-union relief to remedy his situation and processed his complaint through 27 months of intra-union proceedings giving the union "at least some opportunity" to resolve its dispute with him before instituting an action in federal court. Id. at 312. It is clear that plaintiff herein sought no intra-union appeal of any kind after learning that his grievance would be pursued no further by Local 12.

Nor can the instant situation be compared to that set forth in Ruggirello v. Ford Motor Co. 411 F.Supp.758(E.D.Mich. 1976), cited by plaintiff, where the grievant's failure to exhaust his intra-union remedies was caused by misrepresenta-

tions made by union officials. In the case before this Court, there is no indication, nor facts to support an assertion, that union officials made any representations to plaintiff. In fact, the record indicates that if a misrepresentation was made to plaintiff, it was apparently done by the attorney from legal aid whom he had contacted to help him with his grievance.

The Court notes that with respect to knowledge which plaintiff had of remedies available to him, plaintiff does not deny that he received copies of Solidarity, a union publication in which internal union remedies were explained, as well as the union constitution and by-laws which expressly set forth the avenues which plaintiff could pursue on appeal. In view of the totality of all the circumstances stated above, this Court does not find that

the well-thought-out requirement of exhaustion of intra-union remedies should be waived in this instance. Therefore, the Court finds that plaintiff should be precluded from proceedings with this action since had has failed to exhaust his intra-union remedies.

It is well settled that as the exclusive bargaining representative of plaintiff, Local 12 had a statutory duty to fairly represent him. However, proof of unfair representation requires a showing that "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, supra at 190. While it is not necessary for the Court to pursue the remaining claims raised by Local 12, the Court herein notes that Local 12's failure to take plaintiff's grievance to arbitration cannot, in and of itself, be considered a breach of duty of fair representation. Id.

at 191. There is no obligation for a union to arbitrate grievances it believes are not meritorious. In this case, there appears to be clear support for the union decision not to pursue plaintiff's grievance to arbitration. Furthermore, as to plaintiff's assertion as to fairness, good faith and motivations of the defendants with respect to his grievance proceedings, the Court notes that there is merit to the claim of the defendants that plaintiff's complaint and supporting documents contain only conclusory allegations which are insufficient to state a claim for breach of duty of fair representation. See Balowski v. UAW, 372 F.2d 820 (6th Cir. 1967).

Defendant Jeep has also filed for summary judgment in this action. To prevail against a company in an instance such as this, plaintiff has the burden of demonstrating that his discharge was in

violation of the collective bargaining agreement. Hines v. Anchor Motor Freight, 424 U.S.554(1976). A review of the record herein, however, can lead the Court to no other conclusion than that plaintiff was fired for cause. The Court further notes that in the instant action, only generalized allegations exist in the record which are not supported by plaintiff with appropriate facts. The Court finds that the motions of defendants for summary judgment are well taken.

THEREFORE, for the reasons stated, good cause appearing, it is

ORDERED that the motion of Local 12 for summary judgment be, and it hereby is, SUSTAINED, and the clerk shall enter judgment in accordance herewith; and it is

FURTHER ORDERED that the motion of Jeep for summary judgment be, and it hereby is, SUSTAINED, and the clerk shall enter judgment in accordance herewith.

IT IS SO ORDERED.
/s/ Don J. Young
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 77-562

Gerald V. Conrod, Jr.,

Plaintiff,

vs.

International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW Local 12 et al.,

Defendants.

JUDGMENT

FILED: Oct. 15, 1979

Before: Young, Don J.

This action came on for consideration before the Court, Honorable Don J. Young - - - - - -United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that summary judgment is hereby entered in favor of the defendant, International Union, United

Automobile, Aerospace, Agricultural Implement Workers of America, UAW Local 12.

Dated at Toledo, Ohio, this 15th day of October, 1979.

James S. Gallas
Clerk of Court

by: Margaret Lewis
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 77-562

Gerald V. Conrod, Jr.,

Plaintiff,

vs.

Jeep Corporation, et al.,

Defendants.

MEMORANDUM AND ORDER

FILED: Oct. 31, 1980

Before: YOUNG, J.

This cause came to be heard upon the filing of several motions by the plaintiff in this action. Pursuant to Fed. R. Civ. P. 59(a) and (e), the plaintiff has moved that this Court vacate the judgments of dismissal which have been entered in this case and allow him to go forward. In the alternative, plaintiff moves that this Court amend such judgments of dismissal so

as to be without prejudice. The plaintiff has also moved to compel answers to interrogatories and for leave to file the affidavit of one Harold B. Penson. Jeep Corporation (hereinafter "Jeep") and United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12 (hereinafter "Local 12"), defendants in this action, have opposed such motions of the plaintiff.

On October 15, 1979, this Court sustained the motions of defendants Jeep and Local 12 for summary judgment. It is the judgments entered on behalf of the Court's disposition of such motions on which the instant motions are based. On July 12, 1979, the Court first considered the summary judgment motions of the defendants along with other motions which were pending in the case. Upon review of the summary judgment motions and plaintiff's affidavit

couched in terms of an opposition to such motions of the defendants, in the interest of justice, the Court reserved ruling on same, and granted plaintiff leave for discovery, in that he could obtain answers to interrogatories which had been served on Local 12. The Court further, sua sponte, granted plaintiff leave to additionally oppose defendants' summary judgment motions within 20 days of the filing of Local 12's interrogatory answers. Local 12 responded to the plaintiff's interrogatories on August 20, 1979. Pursuant to Court order, plaintiff's opposition to the summary judgment motions was due September 10, 1979. No such opposition was forthcoming. This Court thereby, on the basis of the documents before it, ruled on the summary judgment motions of the defendants' on October 15, 1979, sustaining them and entering judgment on behalf of Local

12 and Jeep.[1]

Now that judgment has been rendered against the plaintiff in this action, he has approached the Court with numerous motions and voluminous documents in an attempt to have the judgments vacated and apparently, to offer opposition to the defendants' summary judgment motions. In July of 1979, the Court gave plaintiff a second opportunity to oppose the summary

1. As plaintiff points out, at 4:25 P.M. On Friday, October 12, 1979, plaintiff filed a pretrial brief with this Court, in response to an October 1, 1979, Court order, in which he was given notice of a pretrial conference and ordered to file a brief. In the body of the brief, plaintiff said he intended to ask that this action be held in abeyance so that further discovery and union appeal attempts could be pursued. At 9:24 A.M. on Monday, October 15, 1979, the Court docketed its opinion and order sustaining the defendants' summary judgment motions. The pretrial brief of the plaintiff was not reviewed by the Court as opposition to the defendants' motions since it was neither couched in such terms nor timely filed.

judgment motions of Local 12 and Jeep, which were filed in late 1978. The plaintiff, however, did not take advantage of such opportunity, and now, after final disposition of the action, is approaching the Court with matters which should have been previously raised. The Court understands that attorneys are busy and that the demand of other work often makes it impossible for counsel to meet certain time restraints. That is why motions for extensions of time exist, and should an attorney find himself in a difficult position with respect to meeting a deadline, he must so inform the Court rather than simply doing nothing, indicating a response is not intended.

The matters with which the plaintiff now approaches the Court raise some new conclusory allegations, but essentially embellish the evidence and allegations which

have been previously filed herein. In the October 15, 1979 order, the Court considered the merits of this action and found that the plaintiff was precluded from proceeding with this action against Local 12 since he had failed to exhaust his intra-union remedies. The Court further concluded therein that the plaintiff was fired by defendant Jeep for good cause. Upon careful review of the proceedings herein, the Court is not disposed to disturb its prior rulings and the resultant judgment entries. Very recently, the plaintiff has apparently instituted appeal proceedings with the International Union for his alleged wrongful dismissal. This was something which should have been done prior to the initial filing of this action. In fairness to all the parties involved in the lawsuit, the Court will not amend the judgments in this case so as to be without

prejudice.

Therefore, for the above stated reasons, good cause appearing, it is

ORDERED that the plaintiff's motions pursuant to Fed.R.Civ.P. 59(a) and (e) and to compel answers to interrogatories should be, and hereby are OVERRULED; and it is

FURTHER ORDERED that the plaintiff's motion for leave to file an affidavit should be, and hereby is, OVERRULED.

IT IS SO ORDERED.

/s/ Don J. Young
Sr.United States District Judge

Toledo, Ohio.

APPENDIX F

SELECTED PARTS OF RULES, FEDERAL RULES OF CIVIL PROCEDURE

Rule 1 "....they shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 15(b) Amendments to Conform to the Evidence.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining

his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Rule 54(c) Demand for Judgment

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 56(c) Motion and Proceedings Thereon

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-387

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GERALD V. CONROD, JR.,

Petitioner,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE AND PROOF OF SERVICE

Three copies of Respondent's brief in opposition to the petition for a writ of certiorari have been mailed to the following counsel of record:

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No. 82-387

IN THE
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OCTOBER TERM, 1982

GERALD V. CONROD, JR.,

Petitioner,

vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTRODUCTION

Petitioner Gerald V. Conrod filed his petition for writ of certiorari on September 2, 1982. A copy of said petition was received by Respondent Jeep Corporation on September 3, 1982. In light of the unusual style and arguments made on behalf of the Petitioner, Respondent Jeep Corporation finds it necessary to file this short brief in opposition to the petition for certiorari. This brief is intended to comport with the United States Supreme Court Rules, specifically Rules 22 and 33. The time for filing this brief pursuant to Rule 29.1 has not expired.

ARGUMENT

"A review on writ of certiorari ... will be granted only when there are special and important reasons therefor." United States Supreme Court Rules, Rule 17.1. This Court has identified the following as reasons sufficient to justify granting the writ: (a) conflict among the federal courts of appeals, (b) conflict between a federal court of appeals and a state court of last resort on a federal matter, (c) departure of a federal court of appeals from the usual course of judicial proceedings so as to call for an exercise of judicial supervision, (d) conflict between state courts of last resort, or (d) the case presents an important and unsettled question of federal law. See Rule 17.1(a)-(c).

The instant petition for writ of certiorari fails to demonstrate, and respondent Jeep Corporation is unaware of, any conflict between or among the federal courts or the high state courts. Similarly, the proceedings at the Court of Appeals level were handled

with the efficiency and dignity expected of courts of appeals.

The petition for certiorari asserts that "both the discharged employee and the union will benefit from the direction this case can afford." Petition at 23. However, because the petition, in effect, requests a ruling on the facts unique to this case, the benefit is limited to the parties at issue. Thus, the petition for writ of certiorari presents no important and unsettled question of federal law. Instead, a question of fact decided by the District Court and reviewed and affirmed by the Court of Appeals for the Sixth Circuit is presented for review. Reconsideration by this Court would serve only to re-explore factual disputes of significance only to the immediate parties.

I.

THIS COURT'S VACA V. SIPES STANDARD AGAINST WHICH A COLLECTIVE BARGAINING REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION IS MEASURED IS BOTH EXPLICIT AND CONSISTENTLY APPLIED.

Petitioner contends as reason for granting his petition for writ of certiorari that this Court has failed to adequately address the scope of a union's duty to investigate a grievance. That duty to investigate, however, is but one of the various responsibilities associated with the duty of fair representation undertaken when a union assumes its status as a collective bargaining representative. This Court has, on numerous occasions, addressed the issue of a collective bargaining representative's duty of fair representation.

This Court dictated the legal standard against which a statutory bargaining agent's conduct is measured in Vaca v. Sipes, 386 U.S. 171 (1967) wherein it stated:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bar-

gaining unit is arbitrary, discriminatory or in bad faith." 386 U.S. at 190. See also, Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

This Court has also recognized that

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit that it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion". Ford Motor Company v. Hoffman, 345 U.S. 330, 338 (1953).

These guidelines governing the conduct of bargaining representatives have been universally implemented in the litigation of claims alleging breaches of the duty of fair representation. See, e.g., Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir., 1975); Griffin v. UAW, 469 F. 2d 181 (4th Cir., 1972); Local No. 13 v. Pacific Maritime Association, 441 F. 2d 1061 (9th Cir., 1971) cert. den. 404 U.S. 1016 (1972); DeArroyo v. Sindicato DeTrabajadores Packinghouse, 425 F. 2d 281 (1st Cir.), cert. den. 400 U.S. 877 (1970).

II.

THE STANDARDS FOR EVALUATING RACIAL DISCRIMINATION AND "REVERSE RACIAL DISCRIMINATION" UNDER BOTH TITLE VII AND 42 U.S.C. SECTION 1981 ARE APPARENT FROM THIS COURT'S RECENT DECISIONS INCLUDING MCDONALD V. SANTA FE TRAIL TRANSPORTATION COMPANY.

The petition for a writ of certiorari asserts that the judiciary needs direction as to what constitutes "reverse racial discrimination". While counsel for petitioner cites this Court's decision in McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976), he fails to evaluate the impact of the Court's ruling.

As noted in McDonald v. Santa Fe, the provisions of Title VII, 42 U.S.C. Section 2000e, et seq., are not limited to discrimination against members of any particular race. Instead, the Act protects an individual from discrimination because of his race, irrespective of the racial category. 427 U.S. at 278-79. Similarly, with regard to discrimination against whites and the effect of 42 U.S.C. Section 1981, this Court stated in McDonald v. Santa Fe, "Our examination

of the language and history of Section 1981 convinces us that Section 1981 is applicable to racial discrimination in private employment against white persons." 427 U.S. at 287.

As would be expected, the federal courts have completely accepted the position taken by this Court and have held Title VII and Section 1981 to be similarly applicable to both blacks and whites. See, e.g., Occhino v. Northwestern Bell Telephone Company, 675 F. 2d 220 (8th Cir.) cert. den. 102 S. Ct. 2971 (1982); Bobo v. ITT Continental Baking Company, 662 F. 2d 340 (5th Cir., 1981) cert. den. 102 S. Ct. 1985 (1982); Torre v. Barry, 661 F. 2d 1371 (D.C. Cir., 1981); Tangren v. Wackenhut Services, 658 F. 2d 705 (9th Cir., 1981) cert. den. 102 S. Ct. 1771 (1982); and Fiedler v. Marumsco Christian School, 631 F. 2d 1144 (4th Cir., 1980). Thus, once again, there is no apparent conflict among the courts as to the legal standards and analyses appropriate in evaluating claims of race discrimination. In addition, the ques-

tion posed to this Court in Part II of the petition parallels the issues and analyses presented seven years ago in McDonald v. Santa Fe, supra.

III.

THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE DISTRICT COURT'S RESPONSIBILITIES WITH REGARD TO CONFORMING THE PLEADINGS TO THE EVIDENCE AND WITH REGARD TO GRANTING SUMMARY JUDGMENT MOTIONS.

Part III of the petition for certiorari presents the Court with the questions of a trial court's duty to consider evidence not pleaded and the trial court's duty to grant leave to file an amended pleading before ruling on a motion for summary judgment.

As cited by the Petitioner, Rule 15(b) of the Federal Rules of Civil Procedure directly addresses the issue framed and provides the district courts with the appropriate guidance. Rule 56 of the Federal Rules of Civil Procedure similarly addresses Petitioner's concerns. Thus, there is no reason for this Court to mechanically evaluate the application of these rules to the facts of this case, especially since Petitioner has not asserted and the Court of Appeals found no abuse or misuse of the rules of procedure on the part of the District Court.

IV.

THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE RELEVANT CASE APPLICATIONS ADEQUATELY ADDRESS AND GOVERN THE RIGHTS AND DUTIES OF THE COURTS OF APPEALS WITH REGARD TO CONSIDERATION OF MOTIONS TO AMEND THE PLEADINGS.

Part IV of the petition for certiorari asserts that the Court of Appeals "has both the right and duty to consider and rule upon a motion to amend the pleadings to conform to the evidence adduced below." Petition for certiorari at 30. Respondent Jeep concurs. The Court of Appeals has the right to consider all evidence adduced at the District Court level and may consider the pleadings amended insofar as the record supports such amendment, as permitted by Rule 15(b) of the Federal Rules of Civil Procedure.

Petitioner, however, failed to provide the Court of Appeals with evidence to justify considering the pleadings amended. Petitioner argued to the Court of Appeals that the issue of "reverse racial discrimination" was before the Court. However, in the Court of

Appeal's order of May 25, 1982 denying the petition for rehearing, the Court stated:

> "Filing a charge with the EEOC is not a prerequisite to suit under Section 1981. However appellant is still entitled to no relief on appeal. He did not fairly raise this cause of action prior to entry of judgment by the District Court. His complaint does not mention racial discrimination and in context the sporadic references to race in appellant's other prejudgment pleadings are insufficient to put the parties or District Court on notice that racial discrimination was a ground on which appellant claimed relief. In fact in his deposition appellant states that he is not claiming that he was discriminated against.
>
> "Further, even if the discrimination issue was raised, appellant offered only the most conclusory statements in support thereof prior to judgment. Such conclusory allegations are not sufficient to withstand appellee's motions for summary judgment under F.R.Civ.P. 56.
>
> "Finally, there is not such evidence of racial discrimination in appellant's post-judgment Rule 59 motion for us to find the District Court's refusal to vacate or amend its judgment was error, much less an abuse of discretion. Accordingly, construing appellant's discrimination claim as arising under Section 1981, we still are not persuaded to reverse the District Court's entry of summary judgment in favor of appellees." (emphasis added)

The Court of Appeals for the Sixth Circuit, therefore, obviously considered Petitioner's motion that his complaint be amended to conform to the evidence adduced at the District Court level. The Court of Appeals also, however, found that evidence insufficient to support granting such a motion to amend the pleadings.

V.

THE ALLOCATION OF THE BURDEN OF PROOF AS TO THE ADEQUACY OF EXHAUSTING INTRA-UNION REMEDIES PRIOR TO INSTITUTING A SECTION 301 ACTION WAS NOT AND IS NOT RELEVANT TO THE FACTS AT ISSUE.

Part V of the petition for certiorari raises the question concerning which party bears the burden of proof as to the issue of the exhaustion of intra-union appeals. Petitioner asserts that the issue has not been decided by this Court and further asserts that the employer and union should bear the burden of proof as to the issue.

Without commenting on the merits of Petitioner's claim, we respectfully contend that this issue should not be before the Court. Petitioner has never raised a substantial argument opposing Respondents' affirmative defense that the mandatory intra-union appeal was never taken. In fact, petitioner filed an affidavit in the District Court in which he stated that he did not attempt his intra-union appeal because he thought it would take too long and because his previous attorney advised him that he had no such appeal. Both the

District Court and the Court of Appeals rejected this as an acceptable basis for his failure to exhaust. Thus, the question of which party bears the burden of proof as to the exhaustion of intra-union appeals is not an issue before this Court.

In addition, even under his theory of allocation, Petitioner has set forth no facts in these proceedings which indicate that the lower courts improperly delegated the burden of proof. Both the Court of Appeals and the District Court opinions recognized that no evidence was offered to contradict or mitigate petitioner's failure to exhaust. Both Respondents raised the affirmative defense that Petitioner failed to exhaust his intra-union remedies. The Petitioner's only response was to admit such failure and to offer a justification which neither the District Court nor the Court of Appeals found sufficient.

VI.

THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE TRIAL COURT'S RESPONSIBILITIES WITH REGARD TO MOTIONS UNDER RULES 56 AND 59

In Part VI of the petition for certiorari, the Petitioner maintains that affidavits filed with the Rule 59 motion to alter or amend the judgment after summary judgment was entered should have been considered in ruling upon the motion for summary judgment. The District Court and the Court of Appeals for the Sixth Circuit obviously agreed with the Petitioner's position.

In the order issued by the District Court on October 31, 1980 in response to Petitioner's Rule 59 motion, the District Court addressed the post-summary judgment affidavits and evidence stating:

> "The matters with which the plaintiff now approaches the Court raise some new conclusory allegations, but essentially embellish the evidence and allegations which have been previously filed herein. ... Upon careful review of the proceedings herein, the Court is not disposed to disturb its prior rulings or the resultant judgment entries."

Similarly, upon appeal to the Court of Appeals alleging error, the Court of Appeals stated in its opinion dated March 4, 1982:

> "The only issue appellant raises that arguably challenges this finding is the last—that the post-judgment affidavit submitted to the court stated a claim for relief. The only evidence helpful to appellant in the affidavit is a claim that several other employees were not fired for doing similar acts. This evidence, which if true still does not establish that appellant was not fired for just cause, does not warrant reversing the District Court's grant of summary judgment." (emphasis added)

Thus, the relevant additional evidentiary filings were considered and rejected by the District Court and were similarly reviewed and rejected by the Court of Appeals. Petitioner's writ to this Court complains not of misapplication of legal procedure but of the adverse determination on the facts resulting from proper application of the proper procedure.



CONCLUSION

This Court has determined that certiorari will be granted "only when there are special and important reasons therefor." Rule 17.1. While this case is of some special importance to the immediate parties, its resolution is neither of important national consequence, nor will it involve consideration of unique and important legal issues. The six questions presented by the Petitioner for review are each subject to ascertainable and workable legal standards or court rules announced or approved by this Court. There are no demonstrable conflicts between courts of different forums with regard to any of the question presented. Further, the Petitioner has demonstrated no abuse or misuse of procedures by the Court of Appeals, nor has it demonstrated unchecked error on the part of the U.S. District Court.

For all of these reasons, the Respondent Jeep Corporation respectfully prays that this Court decline to exercise its appellate jurisdiction and that it

deny the Petitioner's request for a writ of certiorari.

Respectfully submitted,

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Dated: September 1, 1982